Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

WILLIAM J. POLIS,

Petitioner,

vs.

WILLIAM F. WELD, CHARLES D. BAKER, PHILIP CAMPBELL, DENNIS MILLNER-HANLEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Certiorari should be granted to resolve the conflict among the circuits as to whether a state agency's responsibility to make payments to a vendor can constitute constitutionally protected property which is protected by due process in 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDING

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statute Involved	1
Statement of the Case	3
A. Contract Payments	7
B. Mr. Polis' Efforts	9
C. Newspaper Articles and Defendant's Actions	10
D. Mr. Polis' Ordeal	13
Reasons for Granting the Writ	14
I. Certiorari Should Be Granted To Resolve The Conflict Among The Circuits As To Whether A Government Agency's Requirement To Make Specific, Timely And On-Going Payments To Its Provider Constitutes Constitutionally Protected Property.	14
Conclusion	20

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Arnold v. International Business Machines, 637 F.2d 1350 (1989) 19

Brock v. Roadway Express, 481 U.S. 252, 107 S. Ct. 1740 (1987) 15

Christ Gatzonis Elec. v. New York City Sch. Const., 23 F.3d 636 (2nd Cir. 1996) 15

Commonwealth of Massachusetts v. William Polis, President of Integrated Service Associates, Inc., Attleboro District Court Criminal Action Numbers 9534 CR 0476 *et seq.* 14

General Electric v. New York State Department of Labor, 936 F.2d 1448 (2nd Cir. 1991) 15, 18

Holmes v. Henman, 815 F. Supp. 479 (M.D. Ala. 1993) 18

Ibraham v. United States Department of Agriculture, 650 F. Supp. 163 (N.D. N.Y. 1987) 18

Johnson v. Duffy, 588 F.2d 740 (1978) 19

Mortik v. Blalock, 983 F.2d 1353 (6th Cir. 1993) 15

Contents

	Page
Soranno's Gasco, Incorporated v. Morgan, 874 F.2d 1310 (9th Cir. 1989)	19

Statutes Cited:

28 U.S.C. § 1254(1)	1
42 U.S.C. § 1983	i, 1, 2

United States Constitution Cited:

Amendment V	1
Amendment XIV	1, 2

Rule Cited:

Federal Rules of Civil Procedure 12(b)(6)	1, 14

Other Authorities Cited:

Comptroller Regulations:

815 CMR 3.03(b)	16
815 CMR 3.04-3.05	9
815 CMR 3.04-3.06	16
815 CMR 4.00	8

Contents

Page

Division of Purchase Services:

808 CMR 2.04-2.05 5

808 CMR 2.07 5

808 CMR 2.07(4)(a)-(d) 7

808 CMR 2.10 ..... 4, 5

808 CMR 2.11 4

808 CMR 2.14 5

808 CMR 2.15 5

Massachusetts General Laws chapter 29, Section 29C . 8

Massachusetts General Laws chapter 149, Section 149 ..... 13, 14

APPENDIX

Appendix A — Per Curiam Opinion Of The United States Court Of Appeals For The First Circuit Dated December 18, 1997 ..... 1a

Appendix B — Opinion Of The United States District Court For The District Of Massachusetts Dated July 24, 1997 ..... 3a

OPINIONS BELOW

The First Circuit Court of Appeals on December 18, 1997, entered a per curiam opinion affirming the opinion of the United States District Court from the District, Tauro, J. Both decisions dismissed the Petitioner's complaint for failure to state a claim. Federal Rules of Civil Procedure 12(b)(6). Neither opinion is reported. The per curiam opinion of the Appeals Court is reproduced in the Appendix filed herewith ("App.") at 1a. The opinion of the District Court is reproduced at 3a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on December 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Petitioner relies upon the United States Constitution, Amendment V and XIV, and 42 U.S.C. § 1983. The pertinent provisions are as follows:

AMENDMENT V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV
[1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Petitioner William J. Polis ("Mr. Polis") commenced this action on March 7, 1996 to recover for the violation of his civil rights.

As will be set forth in greater detail in the following paragraphs, Mr. Polis was Executive Director of Integrated Service Associates, Inc. ("ISA"), a Massachusetts non-profit corporation which provided twenty-four hour staffing for mentally retarded adults pursuant to its contracts with the Commonwealth of Massachusetts Department of Mental Retardation ("DMR").

Mr. Polis is a resident of Grafton, Massachusetts who was an employee of S.E.R.V.E.S.S., Inc. ("Servess"), by which name ISA was previously known. In the late 1980's, DMR knew that Servess management had financially mismanaged the corporation. DMR notified federal authorities, who criminally prosecuted Servess management.

DMR officials in 1989 encouraged Mr. Polis to take over as Servess' Executive Director, in order to assure continuous service to the mentally retarded adults serviced by the contracts. He took over as Executive Director, changed the corporate name to ISA, and cooperated with DMR and authorities in the federal investigation of Servess' management.

At the time he took over as Executive Director, ISA had a payroll tax obligation of $200,000 and negative retained earnings between $400,000 and $500,000. DMR also contended it had overpaid Servess approximately $961,261 during fiscal years 1985 through 1988, and sought to recover this amount from ISA.

DMR entered into a five year Master Agreement with ISA for the period July 1, 1989 through June 30, 1994. This contract is governed by Regulations of the Division of Purchased Services ("DPS Regulations"), which set forth the following framework with respect to contracts with providers of supports to mentally retarded adults:

(1) DMR takes proposals from prospective providers and determines if the provider has the financial and administrative capacity to fulfill its contractual obligations Bidders who satisfy the minimum standards of financial and administrative capacity are "pre-qualified";

(2) Bids of the pre-qualified bidders are evaluated, and an award is given to the provider whose bid is judged most advantageous. Any pre-qualified bidder has the opportunity to discuss with the purchasing agency the basis for the award decision, and administrative appeal is provided;

(3) DMR traditionally enters into a five year contract with the provider who receives the award. This Agreement, or Master Agreement, is subject to DMR and the provider entering into a renewal contract each year of the cycle which more extensively deals with the services to be provided during the ensuing year;

(4) The Agreement must provide for termination for cause, at any time, upon reasonable notice. The regulations state that the Agreement may provide for termination without cause, upon proper notice, and for automatic renewal on an annual basis, subject to certain conditions set forth in Section 2.10 and 2.11;

(5) The regulations, in Section 2.10, require that the contracts be automatically renewed during each year of the cycle, provided certain conditions stated in the applicable regulations are satisfied, which include the provider's satisfactory performance of its services;

(6) DMR must review at least annually the provider's performance. *See* Regulations of the Division of Purchased Services. DPS Regulations 808 CMR 2.04-2.05, 2.07, 2.10, and 2.14.

The Regulations also set forth a procedure for debarment of a provider, whereby a provider is deemed ineligible to provide special education services. "Debarment" basically involves termination for reasons of bad character. The procedure requires notice and hearing. (DPS Regulations 2.15).

DMR and ISA entered into two Corrective Action Plans. The first, dated July 20, 1990, required ISA provide "in-kind" services for two clients over a ten year period, to reimburse DMR for DMR's overpayments to Servess. The Plan specifically stated:

> In the case of default, non-compliance or substantial delay in implementing the corrections set forth in Attachment "A" [provision of in-kind services], the DMR reserves the right to re-evaluate all contractual relationship with the Provider for the purpose of amendment and/or termination.

The Second Corrective Action Plan, dated January 13, 1992, required ISA to secure a credit line of $250,000 to enable ISA to keep current with liabilities while it completed other corrective action measures, such as pay Servess' overdue payroll tax obligations. This plan had the identical termination language stated in the prior plan. Furthermore, DMR knew that Mr. Polis personally guaranteed the credit line in reliance upon statements by DMR officials that DMR would do business with ISA for so long as ISA met the requirements of the annual pre-qualification agreements.

Pursuant to the DPS Regulations, DMR officials would meet with Mr. Polis prior to every contract year to discuss DMR's objectives for the coming year. DMR would then send a Pre-Qualification Letter which specified the conditions ISA must meet. DMR officials told Mr. Polis that DMR would do business with ISA for so long as ISA met the requirements of the annual Pre-Qualification Agreements. On June 29, 1992, DMR sent ISA the Pre-Qualification letter for the year beginning July 1, 1992, which stated the conditions with the following prefacatory language:

> The conditions which are outlined below must be adhered to in order for your organization to continue to do business EOHHS (Executive Office of Health & Human Services) agencies. Failure to comply with these conditions may result in the revocation of your Pre-qualification to do business with EOHHS agencies. If this occurs any EOHHS agency with which your are currently doing business may be forced to invoke the termination provisions as outlined in Section IV(F) of the General Conditions of the Master Agreement for Social Service Contract issued by the Executive Office for Administration and Finance (EOAF).

Mr. Polis believes that DMR had never terminated a contract with a provider except for violation of an express pre-qualification condition and upon notice and an opportunity to comply. DMR officials told Mr. Polis that DMR would not terminate its contracts unless ISA did not comply with a provision of a Pre-Qualification Agreement. Mr. Polis reasonably believed that DMR would only terminate its service contracts with ISA if ISA violated a condition of the Pre-Qualification Agreement.

A. Contract Payments

Pursuant to their five year Master Agreement, DMR and ISA would enter into several service contracts each year to establish the rules upon which ISA would be paid for certain of its clients. By 1993, ISA cared for approximately eighty (80) clients at twenty-six (26) homes in Massachusetts. ISA employed approximately 167 full and part-time employees who cared for the clients. The contracts were structured as a "cost reimbursement", as referred to in DPS Regulations, 808 CMR 2.07(4)(a)-(d). Pursuant to these regulations, each contract would provide a number of "units" which would ordinarily be the number of clients serviced by the contract times the 365 days in a contract year. The contract would set forth a unit rate to be paid for each unit or how much would pay ISA for each individual for one day's service. The contract would also state the maximum obligation for DMR to pay, and incorporate a detailed budget.

In determining the unit rate, DMR recognized that due to client illness, vacations, et cetera, the provider could actually expect to deliver fewer units of services than full operational capacity. Accordingly, DMR's contracts entitled the provider to receive full contract payment if the provider furnished at least 85% of its units. Accordingly, the unit rate was increased proportionately to "build in" the 85% rate assumption into the rate. DMR would also make its highest payment to ISA at the beginning of the year, to pay such annual expenses as Workers Compensation and other insurance, deposits on residential settings where clients lived, and other annual expenses. Consequently, DMR's payment would be correspondingly less during the remaining months of the fiscal year. The annualized expenses, such as insurance and deposits on properties, could not be allocably recouped in the event of early termination.

The Master Agreement stated that DMR may disallow, set off, or recoup prior payments if DMR determined that ISA had not provided services to the extent billed, billed for persons who were ineligible for services, or had received duplicate or otherwise excess payments. DMR could delay payment if ISA filed to timely produce required reports or refused to permit inspection or audit of its records. The Agreement in either instance required that DMR give ISA written notice and an opportunity for hearing. Subject to only these conditions, ISA was entitled to payment within the terms of Massachusetts General Laws chapter 29, Section 29C and Regulations of the Comptroller ("Comptroller Regulations") 815 CMR 4.00. These provisions require that DMR make payment within forty-five days and that DMR would be liable for late penalty interest if it was delinquent.

Almost all of ISA's contracts with DMR were subject to the "ready payment" system, by which DMR would make payment twice each month, as follows:

DMR would make an automatic mid-month payment, on or about the fifteenth day of each month, in the amount of one twenty-fourth of the total contract year funding. ISA at the conclusion of each month would submit its units for the month, or the number of days it serviced each client, as well as its monthly expense vouchers. DMR would reimburse ISA for the difference between the total of the monthly vouchers less the "ready payment" paid in the middle of the month.

The Comptroller's Regulations state that DMR could suspend or terminate the Ready Payment System only as follows:

(a) it may suspend only if the provider either breaches a material contract provision or fails to perform or timely fulfill the contract provisions, and in either event, the provider fails to cure after written notice;

(b) it may terminate only if (a) the provider has demonstrated bad faith or an intentional disregard of its duties; (b) the ready pay was suspended and adequate cure was made within the time specified; or (c) the contract has been subject to continual or frequent suspension from the ready payment, and the Department determines that due to the provider's continuing intentional disregard ready payment is no longer an appropriate mechanism; and

(c) in the event of either suspension or termination of the ready payment system, DMR must give written notice and a specification of the grounds (Comptroller's Regulations 3.04-3.05:).

B. Mr. Polis' Efforts

Mr. Polis had to administer ISA to pay off the payroll tax obligation and pay back DMR its overpayments. DMR closely monitored ISA and knew of the financial problems. Each year ISA submitted its projected budget to DMR, and would forward its financial information to DMR monthly. DMR would ordinarily set the budget based on ISA's expenses for the previous year plus a projected increase. ISA's financial plans called for operating as conservatively as possible to pay the payroll tax obligation and reduce the deficit retained earnings. DMR's satisfaction with Mr. Polis' services as Executive Director was evident from its maintaining its contracts with ISA, and in fact, met the conditions of each year Pre-Qualification Agreement and the Corrective Action Plans. Due to the streamlined administrative expenditures Mr. Polis implemented, ISA paid the entire payroll tax obligation incurred by Servess' management, and its negative retained earnings were reduced to less then $100,000.

Mr. Polis, his attorney, Thomas E. Giblin, and accountant, Howard M. Newburg, C.P.A., met with DMR officials at their

central office in Boston in July, 1992. DMR officials made clear the need for ISA to update furniture and equipment at its clients' homes. ISA purchased approximately $100,000 of furniture and equipment at DMR's request. These purchases were credited against ISA's Contract Funding, and reduced its remaining funds to conduct operations for the June 30, 1993 fiscal year.

C. Newspaper Articles and Defendant's Actions

On February 16-20, 1993, David Armstrong, then a reporter for the Boston Herald, wrote a series of articles which highlighted alleged examples of the Commonwealth's failure to adequately monitor private agencies doing business with the state Executive Office of Health and Human Services ("EOHHS") and DMR. This was a criticism of Governor Weld's plan to continue privatization of human services, as well as other state functions. The February 18, 1993 article, beginning at page 14, made reference to the state audit of Servess in 1987, and inferred that its management had not changed. Philip Campbell, Secretary of DMR and a Defendant in this action, was quoted in an article the following day as saying that ISA's management had changed and DMR would continue to do business with ISA.

Governor Weld was quoted in the February 23, 1993 edition as stating that the Commonwealth was terminating its contracts with ISA and two other agencies which the Herald article also cited for alleged mismanagement, and stated as his reason, "It is important to maintain confidence in the privatization process. We do take action when this self-dealing is brought to our attention." Governor Weld, by his statement, accused Mr. Polis of participating in self-dealing, which he knew, or should have known, was untrue.

Pursuant to Governor Weld's statement, Secretary Campbell on March 8, 1993, mailed ISA a letter terminating the Master Agreement and its service contracts, without cause, as of May 10, 1993, pursuant to Master Agreement IV(F)(3). ISA was neither given any notice of a reason for the termination, nor a hearing. Mr. Polis believes Secretary Baker participated in the termination.

At the time DMR gave its notice of termination, its contract administrator, Ms. Victoria Murray, orally notified Mr. Polis that DMR was recalculating ISA's funding as follows:

(a) it was taking ISA off "Ready Payment", and

(b) it was reducing ISA's contract payments by 15%, to adjust for the shortened contract year.

DMR neither gave ISA written notice nor a statement of the grounds for taking ISA off ready payment.

Ms. Murray recalculated ISA's contract funding as follows:

(a) she split the contract year into two periods, one from July 1, 1992 to May 10, 1993, the date of ISA termination, and the second from May 11 through June 30, 1993;

(b) she determined the funding to be paid to ISA by multiplying the number of clients by 314, the number of days in the period, times the number of clients;

(c) she then adjusted this sum by multiplying same by 85% of its services to that date. She then multiplied this adjusted calculation of the contract units times the unit rate, to determine the amount to be paid to ISA for the entire period of July 1, 1992 through May 10, 1993;

(d) she subtracted from this sum DMR's payments to ISA during the contract year, to that date, to determine the remainder to be paid to ISA until the May 10, 1993 contract termination; and

(e) she subtracted from the sum calculated in paragraph (3) from the Net Adjusted Program Expense, to determine the balance to be paid to the new provider for the period May 11 through June 30, 1993.

Ms. Murray has stated, by Affidavit, that her reason for suspending ISA from ready-payment was to avoid the possibility of overpayment, and she notified Mr. Polis of the suspension by telephone. Mr. Polis believes that the Defendants had knowledge of, and approved, Ms. Murray's actions.

Ms. Murray's actions unfairly limited the funds to ISA, for the following reasons:

(a) she assumed that ISA was only providing 85% of its units, while it was in fact providing 100% of its units;

(b) because of the "85% convention", ISA was in fact entitle d to almost all of its contract funding, despite the contract year being reduced by approximately 15%. Ms. Murray's recalculation deprived ISA of the payments to which it was contractually entitled; and

(c) because contract payments were accelerated at the beginning of the year, allocating the funding on a per diem basis results in disproportionately low funding for the sixty day notice period.

DMR's calculations allotted ISA the sum of $42,527 to conduct its operations for the period April 1st through May 10,

1993. ISA could not hope to conduct its operations on this funding (Par. 49; App. 12). DMR's calculations made it impossible for ISA to pay its employees, regardless of whether it terminated operations immediately upon receiving the March 8, 1993 notice, or any time thereafter. Only by Mr. Polis keeping ISA in business and requesting additional funds from DMR officials was he able to pay ISA employees, to the extent they were paid. Nevertheless, ISA had trouble paying its April 23, 1993 payroll. It was not able to pay its final payroll on May 7, 1993. Mr. Polis was one of the employees who was not paid.

Neither the Master Agreement nor the Service Contracts contains any provision authorizing DMR's recalculation of ISA's funding. DMR's actions were in violation of express contract provisions.

The May 14, 1993 edition of the Boston Herald quoted DMR spokesman Gerald Ryan as stating that ISA's failure to pay its employees ". . . underline the appropriateness of he Commonwealth's decision (to stop doing business with the firm) . . ." The Petitioner believes, and avers, that Governor Weld, Secretary Baker and Commissioner Campbell authorized Mr. Ryan to make the remarks, which obviously refer not only to ISA, but Mr. Polis individually.

ISA in fact finished its operations on May 8, 1993. If one determines the contractually required payments for ISA's services rendered through May 8, 1993, and deduct DMR's payments, DMR owes ISA an additional $378,419.

D. Mr. Polis' Ordeal

The Commonwealth of Massachusetts brought approximately ninety (90) criminal complaints against Mr. Polis in Attleboro District Court, pursuant to Massachusetts General

Laws chapter 149, Section 149, for failure to pay the final payroll, *Commonwealth of Massachusetts v. William Polis, President of Integrated Service Associates, Inc.*, Attleboro District Court Criminal Action Numbers 9534 CR 0476 *et seq.*

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER A GOVERNMENT AGENCY'S REQUIREMENT TO MAKE SPECIFIC, TIMELY AND ON-GOING PAYMENTS TO ITS PROVIDER CONSTITUTES CONSTITUTIONALLY PROTECTED PROPERTY.

The District Court of Massachusetts, in its decision dismissing Petitioner's complaint pursuant to Federal Rules of Civil Procedure 12(b)(6), stated that,

> The First Circuit has made clear that supposed constitutional claims which are, in substance, ordinary contract claims do not support § 1983 actions.

(App. B at 7a). The First Circuit Court of Appeals, by its per curiam opinion, has endorsed this interpretation of its decisional law.

The Second and Sixth Circuit Courts of Appeals have ruled that certain contractual rights can constitute property protected by procedural due process.

The Second Circuit Court of Appeals has ruled that a party contracting with the government has a claim of entitlement

protected by procedural due process if the contract agreement provides for prompt payment and the government has the right to withhold payment only for certain, specified reasons. *General Electric v. New York State Department of Labor*, 936 F.2d 1448 (2nd Cir. 1991). (Statute entitled contractor to full contract price, except if contractor failed to pay the prevailing wage rates, and provided for a hearing to determine if cause existed to deprive the contractor of the full contract price.) *See also Christ Gatzonis Elec. v. New York City Sch. Const.*, 23 F.3d 636, 640 (2nd Cir. 1996). (No right to prompt payment because the Defendant was availing itself of contractually provided discretion to withhold payment.)

A plurality of the United Stated Supreme Court held that an employer's right to discharge an employee for cause under a collective bargaining agreement constituted a property right protected by procedural due process. *Brock v. Roadway Express*, 481 U.S. 252, 260-261, 107 S. Ct. 1740, 1746-1747 (1987). The Sixth Circuit Court of Appeals has interpreted this holding as establishing that a private contractual right can constitute a property right entitled to due process protection, and that whether the contractual right arose in a broad employment context is not dispositive. The Sixth Circuit Court ruled that a public skating rink could not terminate an instructor's use of the rink without a hearing, as the instructor's contracts with students were constitutionally protected property. *Mortik v. Blalock*, 983 F.2d 1353, 1359-1361 (6th Cir. 1993).

The Defendants' suspension of ready payment without notice and a hearing clearly constituted a violation of procedural due process. ISA's rights to "ready payment" was founded upon state regulations, not be contract. Accordingly, the contention that contract rights are not protected by procedural due process does not apply with respect to the suspension of ready payment.

The Respondents have relied on Comptroller's Regulation, 815 CMR 3.03(b), as authorizing DMR's termination of ready payment. This regulation plainly authorizes an adjustment of the ready payment in the event that the provider's monthly reconciliations of services and for expenses do not support the amount of ready payment. Here, the monthly reconciliations of ISA proved that it was performing all of the monthly units specified in each contract, and clearly supported the amount of ready payments. DMR accordingly had no basis to reduce ISA's ready payments. DMR eliminated the ready payment, not because ISA had not been performing the units of service provided by its contracts, but because DMR had concluded ISA would not be providing services in future months. The regulation does not authorize the reduction of ready payments in this circumstance. The regulation finally states that DMR could make a final reconciliation in the last contract month. This reconciliation, similarly, would be for units provided until that date. (Comptroller's Regulation 3.04-3.06.) Reconciliation would confirm the number of units ISA had performed, which when multiplied by each contract's unit rate, would require DMR to pay ISA the sum ISA claims is due.

The allegations also very strongly establish that ISA's rights to payments were constitutionally protected property, for the following reasons:

(1) ISA would submit its proposed budget to DMR prior to a contract year. DMR and ISA would agree on the budget. ISA submitted its financial information to DMR each month, so DMR could confirm ISA was staying within its budget;

(2) The contractual payments were structured as cost reimbursement;

(3) DMR's contracts with ISA were based solely on payment of a specified rate for ISA's units performed each

month, and did not set forth for recalculation in the event of contract termination. The Master Agreement specifically provided for payment for all services rendered prior to termination (Section IV(F)(6)(e), App. 53);

(4) The payments being correspondingly high at the beginning of the year, so that a provider could pay annualized expenses, such as deposits on homes and workers compensation insurance;

(5) DMR was permitted to withhold payment only in very narrow circumstances, if the provider had not provided services to the extent billed, if it had provided services to an ineligible person, or if the provider received duplicate or otherwise excessive payments, and only after the provider had been given notice to show cause why the disallowance should be made, and a hearing (*see* Master Agreement, Article VII(C);

(6) although ISA's contract rates were based on its projected contract costs, ISA in addition was paying obligations such as payroll taxes, which it was forced to fund out of the contract payments. Furthermore, it also was providing "in kind services" for another client, to repay DMR for over payments, which also reduced ISA's funds;

(7) at the beginning of ISA's last contract year, at the request of DMR officials, ISA purchased $100,000 of furniture and equipment; which further reduced ISA's operating revenues; and

(8) DMR knew ISA was in a very precarious financial situation, and closely monitored its financial situation; and

(9) DMR required ISA to maintain a $250,000 credit line which it knew that Mr. Polis personally guaranteed.

These factual circumstances certainly are consistent with the factual circumstances in *General Electric*, which the Second Circuit held were sufficient for contractual payments to constitute a property interest. Alternatively, the fact that the contract payments constituted all of ISA's revenues and were calculated as estimates of expense reimbursements establish the severe economic damage resulting from the suspension of contract payments, a consideration in determining whether the payments are constitutionally protected property. *Ibraham v. United States Department of Agriculture*, 650 F. Supp. 163 (N.D. N.Y. 1987) and *Holmes v. Henman*, 815 F. Supp. 479 (M.D. Ala. 1993) which decisions considered the adverse financial consequence which suspension from participation in the Food Stamp program would cause the grocery store in deciding that the store's right to participation in the program was constitutionally protected property which could not be suspended without notice and a hearing.

Additionally, ISA's contractual payments were calculated by DMR as a reimbursement for expenses which ISA had incurred in providing services, and ISA notified DMR as these expenses were incurred, yet DMR never considered ISA's remaining costs when it recalculated the payments for the sixty day period prior to termination.

The opinion of the District Court, App. B at 7a, attempts to distinguish the General Electric case by stating that, unlike General Electric the Petitioner does not meaningfully call into question the process underlying the termination and recalculation of the contract (pages 5-6). The Petitioner states that this is by no means a fair construction of the Petitioner's allegations. Based upon the facts recited in the statement of the case, Petitioner claims both the procedure in substance are the Respondents' actions were egregious violations of the contract.

As far as Mr. Polis' standing to raise this claim, Mr. Polis decided to commence this action after the Defendants' protracted refusal to release sufficient funds to pay ISA's employees, despite DMR's knowledge that Mr. Polis was facing criminal charges. He has experienced the trauma of being unable to pay ISA's employees. The Respondents took actions which foreseeably led to his facing criminal prosecution and had a particularly damaging emotional and economic effect upon Mr. Polis. He has sufficient standing to commence this action for his damages. *See Soranno's Gasco, Incorporated v. Morgan*, 874 F.2d 1310, 1318 (9th Cir. 1989). (Shareholder who suffered directly and independently of corporation has standing to sue.) *See also Johnson v. Duffy*, 588 F.2d 740 (1978), and *Arnold v. International Business Machines*, 637 F.2d 1350 (1989).

CONCLUSION

One can hardly imagine a more unique case for considering whether a state agency's contractual payments constitute property protected by due process. The state agency established the provider's budget, set its contract payments accordingly, and monitored the provider's finances to confirm the provider was staying within its budgets. The contract payments were due promptly with only very limited and specific reasons for reduction, which required notice and hearing. Finally, the state agency knew of the devastating effects the failure to pay would have on the provider and it Executive Director, Mr. Polis, which occurred. The Petitioner requests the United States Supreme Court consider whether his constitutional right have been violated.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED DECEMBER 18, 1997

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1934

WILLIAM J. POLIS,

Plaintiff - Appellant,

v.

WILLIAM WELD, ET AL.,

Defendants - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, *U.S. District Judge*]

Before

Torruella, *Chief Judge*,
Boudin and Stahl, *Circuit Judges*.

Paul S. Hughes for appellant.
Lucy A. Wall, Assistant Attorney General, with whom *Scott Harshbarger*, Attorney General, was on brief for appellee.

December 18, 1997

Appendix A

Per Curiam. After full consideration of the parties' briefs and the record provided for our review, we conclude that the district court properly granted the defendant-appellees' motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. We reach this conclusion substantially for the reasons stated by the district court.

Affirmed. See 1st Cir. Loc. R. 27.1. Costs to appellees. Fed. R. App. P. 39(a).

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED JULY 24, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA. No. 96-10496-JLT

WILLIAM J. POLIS,

Plaintiff,

v.

WILLIAM F. WELD, et al.,

Defendants.

MEMORANDUM

June 24, 1997

TAURO, Ch.J.,

Plaintiff, William J. Polis, claims that Defendants, officials of the Commonwealth of Massachusetts, violated his constitutional rights by terminating a contract he held with the state. Presently before the court is Defendants' motion to dismiss the complaint pursuant Fed. R. Civ. P. 12(b)(6).

Appendix B

I.

Factual Background[1]

Plaintiff served as Executive Director of Integrated Services Associates, Inc. ("ISA") from 1939–1993. In this capacity, he contracted with the Massachusetts Department of Mental Retardation ("DMR") to provide services to mentally retarded individuals under the care of the state. Defendants, William F. Weld, Charles D. Baker, Phillip Campbell, and Dennis Millner-Hanley, are four state officials who oversaw DMR. At the time of the events in question, these officials held the respective titles of Governor, Secretary of Health and Human Services, Commissioner of DMR, and Contracts Director of DMR. Plaintiff sues them in their individual capacities.

In February 1993, the Boston Herald printed an article which insinuated that ISA was mismanaged. Five days later, Governor Weld announced that the state was terminating its contract with ISA and two other entities which were also mentioned in the Boston Herald articles. He was quoted in the Boston Herald as stating: "[it] is important to maintain confidence in the privatization process. We do take action when [ ] self-dealing is brought to our attention." Both the contract and state regulations authorized the termination of the contract, with or without cause.

Less than two weeks after Governor Weld's announcement, Defendants, through DMR, provided formal notice to Plaintiff

1. As this matter comes before the court on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court takes the allegations in the complaint as true and draws all reasonable inferences in Plaintiff's favor. *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962 (1st Cir. 1993).

that it was terminating ISA's contract. After providing such notice, Defendants restructured their payments to Plaintiff to account for the shortened contract term. In so doing, they suspended a bi-monthly payment schedule, known as "ready payment," which was called for by the contract. These measures allegedly shortchanged Plaintiff of amounts due under the contract. DMR did not afford Plaintiff a hearing prior to such action.

The termination took effect in May 1993. Due to lack of funds, ISA was unable to satisfy its final payroll. The Boston Herald quoted a DMR spokesperson, who stated that such failure "underline[d] the appropriateness of the Commonwealth's decision to terminate the contract. The Commonwealth subsequently brought criminal complaints against Plaintiff for his failure to meet ISA's payroll.

Plaintiff brings this suit pursuant to 42 U.S.C. § 1983, claiming that Defendants violated his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. He brings pendant state claims for emotional distress, defamation, and civil rights violations.

II.

Parallel Proceedings

In April 1993, three years prior to commencing the present action, Plaintiff brought a separate suit against Defendants Baker and Campbell in Massachusetts Superior Court for Suffolk County. The suit involves the same underlying conduct at issue here, but alleges breach of contract instead of constitutional violations. Plaintiff claims that Defendants Baker and Campbell

breached the contract by terminating it without cause and by recalculating the remaining contract payments.

Upon filing the suit, Plaintiff moved for a preliminary injunction to enjoin the termination of the contract. The Superior Court denied the motion, holding that Plaintiff was not likely to succeed on the merits of the claim.

In June 1996, the Superior Court considered the parties' cross motions for summary judgment. It allowed Defendants' motion in part, holding that they did not breach the contract by terminating it without cause. The court, however, denied both parties' motions for summary judgment with regards to the payment recalculation.

III.

Analysis

Plaintiff presently claims that Defendants (1) deprived him of a property interest in violation of his procedural due process rights, (2) deprived him of a liberty interest in violation of his procedural due process rights, (3) violated his substantive due process rights, (4) violated his equal protection rights, and (5) violated state tort and civil rights laws.

A. *Deprivation of Property Interest*

Plaintiff claims that Defendants deprived him of a property interest in violation of his procedural due process rights by breaching the contract without providing him with an opportunity to be heard. As in the state court suit, he contends that Defendants violated his rights by prematurely terminating the contract and restructuring the remaining contract payments.

This claim, however, does not state a constitutional cause of action because, at bottom, it sounds in contract rather than due process. The First Circuit has made clear that supposed constitutional claims which are, in substance, ordinary contract claims do not support § 1983 actions. *Casey v. DePetrillo*, 697 F.2d 22, 23 (1st Cir. 1983) (*per curiam*) (citing *Jiminez v. Almodovar*, 650 F.2d 363, 370 (1st Cir. 1981)). "Otherwise, virtually every controversy involving an alleged breach of contract by a government or government institution or agency or instrumentality would be a constitutional case." *Id.*

The present claims are indistinguishable from the contract claims which Plaintiff raised in state court. Plaintiff cannot escape this unavoidable conclusion by adorning his complaint with words and phrases such as "procedural due process," "property," and "without a hearing." The complaint, therefore, fails to state a claim under § 1983.[2]

Plaintiff's reliance on *General Electric v. New York State Dept. of Labor*, 936 F.2d 1448, 1453 (2d Cir. 1991), is misplaced. In *General Electric*, as here, the state was alleged to have improperly withheld contract payments from a government contractor. *Id.* at 1453. There, however, the plaintiff earnestly

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2. Even if ordinary contract rights were considered constitutionally protected property interests, Plaintiff's claim would still fail. This is because no contract right was breached, at least with regard to the termination. The express terms of the contract, as well as state regulations, explicitly authorize Defendants to terminate the contract without cause. Plaintiff admits as much in his complaint. Significantly, the Superior Court — at two different stages of the state court litigation — agreed and ultimately dismissed this portion of Plaintiff's contract claim. Plaintiff, therefore, would be hard pressed to establish that he possessed a property interest in the completion of the contract.

challenged the process by which the state arrived at the decision to withhold contract payments. *Id.* In particular, the plaintiff claimed the state unconstitutionally delegated its decision-making power to labor unions. *Id.* Here, by contrast, Plaintiff does not meaningfully call into question the process underlying the termination and recalculation of the contract. *General Electric*, therefore, offers no support for Plaintiff's property interest claim.

B. *Deprivation of Liberty Interest*

Plaintiff next alleges that Defendants' unfavorable public statements, coupled with the contract termination, created a stigma that has impaired his ability to obtain new employment and has, thereby, deprived him of a liberty interest in violation of due process. Such a due process claim lies where, *inter alia,* public statements are (1) stigmatizing to the extent that they might "seriously damage [a person's] standing and associations in the community," and (2) made in connection with the termination of employment or some other alteration of status. *Brennan v. Hendrigan*, 888 F.3d 189, 196 (1st Cir. 1989) (citing *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) and *Paul v. Davis*, 424 U.S. 693, 701, 709-10 (1976)).

Plaintiff, however, does not satisfy the first requirement. He relies on two allegedly defamatory statements: Governor Weld's remark that "[w]e do take action when this self-dealing is brought to our attention" and the DMR spokesperson's remark, which Plaintiff attributes to Defendants, that ISA's failure to satisfy its payroll "underline[d] the appropriateness of the Commonwealth's decision" to terminate the contract. These statements, however, are vague, unspecific, and allege little more than mismanagement. They are not, therefore,

sufficiently stigmatizing.[3] *See O'Neil v. City of Auburn*, 23 F.3d 685, 693 (2d Cir. 1994) ("vague statements of unspecified incompetence" do not give rise to liberty interest claim); *Zepp v. Rehrmann*, 79 F.3d 381, 388 (4th Cir. 1996) (allegations of "management problems" do not give rise to liberty interest claim); *Gregory v. Hunt*, 24 F.3d 781, 788 (6th Cir. 1994) ("allegations of improper or inadequate performance or, in some cases, . . . of incompetence, neglect of duty or malfeasance" do not give rise to liberty interest claim); *Heck v. City of Freeport*, 985 F.2d 305, 311 (7th Cir. 1993) ("a mere charge of mismanagement is not enough to give rise to a liberty interest" claim); *Waddell v. Forney*, 108 F.3d 889. 895-96 (8th Cir. 1997) (allegations of mismanagement do not give rise to liberty interest claim). Accordingly, Plaintiff fails to state a liberty interest claim.

The second statement — that of the DMR spokesperson — is inadequate in an additional respect. It does not satisfy the requirement that the stigmatizing allegations occur in the course of the contract termination. The statement of the DMR spokesperson appeared in the Boston Herald more than two months after Defendants announced that they were terminating the ISA contract. Allegations levied after the termination of employment do not occur "in the course" of the termination itself and, therefore, are insufficient to give rise to a due process claim. *Brennan*, 888 F.2d at 195-96; *Laureano-Agosto v. Garcia-Caraballo*, 731 F.2d 101, 103-04 (1st Cir. 1984) (Breyer, J.).

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3. Governor Weld's remark is insufficiently stigmatizing in the additional sense that its connection to Plaintiff is somewhat remote. The statement implicates two other entities as well as ISA. Furthermore, nothing in the complaint suggests that the statement directly implicates or names Plaintiff personally. These facts further attenuate any impact the statement might have had on Plaintiff's reputation.

In so far as Plaintiff also bases this claim on the stigma resulting from the subsequent criminal complaints filed against him, these additional facts lend no support. First, as with the statement discussed above, the complaints were not filed in the course of the termination of Plaintiff's contract. They were filed two months after the termination of the contract. Second, Defendants are not alleged to have participated in the filing of the charges. The criminal complaints, therefore, are too remote from Defendants and their conduct to support Plaintiff's liberty interest claim.

C. *Substantive Due Process*

Plaintiff also claims that Defendants' actions violated his substantive due process rights because they "shock the conscience." *See Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 325, 531 (1st Cir. 1995) (state action that "shocks the conscience" violates substantive due process rights). In support of this claim, Plaintiff argues that Defendants' course of conduct resulted in his indictment.

The threshold for alleging this type of substantive due process claim is high. *Id.* at 532. Generally, "conscience shocking" conduct requires "extreme or intrusive *physical* conduct." *Id.* at 531.

Souza v. Pina, 53 F.3d 423 (1st Cir. 1995), illustrates this high threshold. There, the plaintiff alleged that a local prosecutor caused the suicide of the plaintiff's son, by publicly linking him to a serial murder spree. *Id.* at 424. The First Circuit nonetheless held that this conduct was not "conscience shocking" and that the substantive due process claim should have been dismissed on the pleadings. *Id.* at 427. The court stated that

"[a] government officials plainly 'despicable and wrongful' conduct does not necessarily give rise to a recoverable federal civil rights claim against the official." *Id.*

Defendants' actions here are comparatively mild and are not, therefore, "conscience shocking." Far from involving "extreme and intrusive physical conduct," Plaintiff's claims center on business dealings and relate to the performance of a contract. As discussed above, everyday contract disputes do not implicate due process rights. *See Jiminez*, 650 F.2d at 370 (breach of contract claims do not support substantive due process claims). Plaintiff, therefore, has failed to state a substantive due process claim.

D. *Equal Protection*

Lastly, Plaintiff alleges that Defendants violated the Equal Protection Clause by treating ISA differently from two other companies — Crystal Spring School and Habilitation Association Corporation — which also provided services to the mentally retarded and which were similarly criticized in the Boston Herald articles. According to Plaintiff, Defendants lacked a rational basis for such disparate treatment. Plaintiff, however, asserts no other facts in support of his equal protection claim.

An equal protection claim must state "facts sufficient to convey specific instances of unlawful discrimination." *Coyne v. City of Somerville*, 972 F.3d 440, 444 (1st Cir. 1992) (internal quotations and citations omitted). A claimant cannot simply assert an inequity and tack on the self serving conclusion that the defendant was motivated by a discriminatory animus. *Correa-Martinez v. Arrillaga-Belendez*, 903 F.3d 49, 53 (1st Cir. 1990) (citing *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 20 (1st Cir. 1989)).

Here, the complaint alleges too few facts to support an equal protection claim. It neglects to explain the manner in which the other companies were treated differently. Furthermore, it fails to identify, or even suggest, any improper animus. The complaint merely contains the bald assertion that "Plaintiff believes, and therefore avers, that [Defendants] did not treat [the other] providers in the manner it treated ISA." This, alone, is insufficient. The facts set forth in the complaint do not "adequately support the thesis that the discrimination was unlawful." *Id.*

E. *State Law Claims*

In view of the court's dismissal of Plaintiff's federal claims, the court dismisses Plaintiff's pendent state claims pursuant to 28 U.S.C. § 1367(c)(3).

IV.

Conclusions

For the above reasons, the court allows Defendants, motion to dismiss the complaint.

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Chief United States District Judge